No. 15909

United States
COURT OF APPEALS
for the Ninth Circuit

W. A. RUSHLIGHT; RAYMOND G. RUSHLIGHT; W. A. RUSHLIGHT COMPANY, a partnership; W. A. RUSHLIGHT, Executor of the Estate of Betty Rushlight, deceased,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

W. A. RUSHLIGHT; RAYMOND G. RUSHLIGHT; W. A. RUSHLIGHT COMPANY, a partnership; W. A. RUSHLIGHT, Executor of the Estate of Betty Rushlight, deceased,
Appellees.

PETITION OF APPELLANTS AND CROSS APPELLEES FOR REHEARING EN BANC

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To the HONORABLE RICHARD H. CHAMBERS, STANLEY N. BARNES and FREDERICK G. HAMLEY, Circuit Judges of the United States Court of Appeals, Ninth Circuit:

The appellants respectfully petition the court for a rehearing of the appeal in the above matter, and respectfully suggest that such rehearing be before the court en banc, on the grounds that:

(1) Admittedly there were no excessive profits for the war years. The court erred in its conclusion that the district court was powerless to grant relief in an action brought to recover non-existent excessive profits;

(2) Such inequitable conclusion is in disregard of the nature of the government's action and established precedents. It reduces the district court from a court of general jurisdiction to the status of a collection agency, and appellants are deprived of any opportunity to assert the meritorious defense that they had *no* excessive profits.

(a) Rehearing Should Be Held En Banc

In the majority opinion, the court said:

> "No doubt if the district court's judgment is upheld the defendants have paid dearly for their business experience with the government. The situation pulls at one's sympathy, but we have determined it is not in our sphere, or the district court's sphere, to grant the relief we would like to grant. Therefore, the judgment must be affirmed." Op. p. 2.

This is tantamount to holding (1) that an unjust and inequitable judgment was entered and is being affirmed, and (2) a district court is absolutely powerless to prevent such a result.

Presumably under our legal system a just and equitable result should follow in each case, and a district court has the power to see that such is the case. We respectfully suggest that where it is felt that a contrary position must be adopted, the matter is of sufficient importance and far reaching effect to warrant the attention of the entire court.

(b) This Court Is Not Powerless to Act

If this were an action in which the matters pleaded by appellants had been considered, or could have been considered by the tax court, then it would undoubtedly be correct to say that the appellants had had their day in court and the district court would be in effect an "enforcement agency in the vicinage of the contractors." Op. p. 3.

That was the case in *Bass v. United States,* 8 Cir., 221 F2d 494, relied upon by this court. However, in that case the finality given the tax court's determination was specifically restricted to questions which either were presented or could have been presented to that agency. Therefore, we respectfully disagree with the court that the *Bass* case is decisive here. Admittedly the defensive matters pleaded by the appellants were not considered by the tax court. Nor does the opinion herein appear to hold or suggest that we were in error in our contention that that so-called "court" was and is an administrative agency without the equitable powers of a district court.

On the score of refusal to apply "equitable recoupment" the court has spoken with apparent finalty. Equitable recoupment of course assumes that the appellants have a cross-demand against the government which an equity court would set off or recoup. However, the court does not squarely face the other facet of our argument relating to the inherent nature of the government's action. As was held in *Stone v. White,* 301 US 532, this is an action in the nature of *indebitatus assumpsit* for money had and received; to recover upon

rights equitable in nature; and to avoid unjust enrichment by the defendant at the expense of the plaintiff. The courts have continued to cite and apply this case in rare but proper situations.

The sole question in the case at bar is whether or not the appellants were and are, in equity and good conscience, indebted to the United States. That is the basis of the government's action. While it is true that carryovers or carrybacks are not allowed, this was an inhibition placed on the renegotiators and the tax court, and is not an inhibition on the inherent equity powers of a district court.

This court assumes that the tax cases which refuse to apply the doctrine of *Stone v. White* are based on restrictions on the power of a court. However, such restrictions are really based on specific statutory inhibitions as is illustrated by the case of *McEachern v. Rose,* 302 US 56, decided after the *Stone* case and cited in *Rothensies v. Electric Storage Battery Co.,* 329 US 296. In the *McEachern* case the taxpayer was suing to recover a refund in two open years based on the manner in which an installment sale had been reported. Admittedly there was a deficiency in a prior closed year when the sale should have been reported. Therefore the taxpayer in equity and good conscience was not entitled to recover. This case, like the case at bar, was one in which there were different years involved. As to the general power of a court in such circumstances, the court said, "We may assume that, in the circumstances, equitable principles would preclude recovery in the ab-

sence of any statutory provision requiring a different result." But then the court pointed out that Congress had specifically provided that an outlawed deficiency could not be offset against a claim for refund, and therefore had specifically precluded the court from applying the equitable principles which it recognized. The same thing was true in the *Rothensies* case where the statute of limitations applied.

No such specific statutory inhibition exists under the Renegotiation Act. The provisions as to carrybacks and carryforwards relate to the powers of the tax court and the negotiators. They do not purport to inhibit a district court from applying general equitable principles. In *McEachern v. Rose* the court was prepared to apply such principles even in a situation involving different tax years and where there was no statutory scheme of carryovers and carrybacks.

When Congress left the matter of finally determining the 1942 renegotiation of appellants to the tax court, it must have done so with full cognizance of the nature and powers of that administrative agency. When it provided for an action against the contractors on a renegotiation liability in a district court, it also must have been fully cognizant of the nature of such an action which would include the power to deny a recovery where such recovery would be completely inequitable as in the case at bar.

Therefore, this court is in error in its previous opinion when it says that inequities under this wartime statute are beyond adjustment.

(c) Conclusion

For the above reasons we respectfully submit that this case should be reheard, and because of its importance, that such rehearing should be by the court en banc.

Respectfully submitted,

HUTCHINSON, SCHWAB & BURDICK,
DENTON G. BURDICK, JR.,
Attorneys for Petitioners and
Appellants and Cross-Appellees.

CERTIFICATE OF COUNSEL

IT IS HEREBY CERTIFIED that in the judgment of the undersigned, the foregoing petition for a rehearing is well-founded, and is not interposed for delay.

Dated at Portland, Oregon,

October 27, 1958.

DENTON G. BURDICK, JR.,
Of Counsel for Petitioners and
Appellants and Cross-Appellees.